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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILLIP M. PROCTOR, *et al.*, *Petitioners*,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*, *Respondents*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Whether on remand the Court of Appeals correctly held, under the standards established by this Court's decision in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), that an alleged horizontal agreement among insurance companies to reimburse policyholders according to a common formula is the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15?

II. Where petitioners had completed their extensive discovery and repeatedly briefed the factual support for their allegations, did the Court of Appeals properly exercise its discretion in reviewing the evidence marshalled in opposition to summary judgment, and in concluding that petitioners' allegations of conspiracy were based upon no evidence whatever?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents State Farm Mutual Automobile Insurance Company, The Travelers Indemnity Company[1] and Nationwide Mutual Insurance Company respectfully request the Court to deny the petition for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the District of Columbia Circuit on March 16, 1982.

STATEMENT OF THE CASE

The petitioners, owners of four automobile repair shops in Virginia and Pennsylvania, brought this anti-

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, we note that The Travelers Indemnity Company is a wholly owned subsidiary of The Travelers Corporation, a Connecticut corporation.

trust action on February 9, 1972, against five automobile insurance companies and certain adjusting firms no longer parties to this case. Petitioners alleged in their complaint that respondents conspired to restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing on a method of determining the value of payments to be made to their insureds in adjusting and settling automobile physical damage claims rendered under insurance contracts.

After three years of extensive discovery, and after petitioners' counsel advised the District Court that they had "substantially concluded discovery" and that "the parties [should] proceed with the filing of such dispositive motions as they deem desirable," [2] the respondents moved for summary judgment on two grounds: (1) that there was no evidence to support petitioners' charges; and (2) that the claims adjustment practices challenged by the petitioners were the "business of insurance" thoroughly regulated by the Commonwealths of Pennsylvania and Virginia, and by virtue of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, outside the scope of the federal antitrust laws.

In a memorandum opinion issued on December 18, 1975, the District Court granted summary judgment based on the McCarran-Ferguson Act and ordered the complaint dismissed. 406 F. Supp. 27 (D.D.C. 1975). On June 17, 1977, the Court of Appeals affirmed with some modification the District Court's decision, ruling that: (1) an agreement among insurance companies to pay or reim-

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[2] A copy of the January 17, 1975 letter from counsel for petitioners so advising the District Court is attached hereto as Exhibit A.

burse claims to policyholders is a central part of the "business of insurance"; (2) the area in question is fully regulated by the states; and (3) by reason of the McCarran-Ferguson Act, such an agreement, even if it existed, would be exempt from the federal antitrust laws. 182 U.S. App. D.C. 264, 561 F.2d 262 (D.C. Cir. 1977).[3]

On February 27, 1979, in *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), this Court held that written "provider agreements" between Blue Shield and certain pharmacies, pursuant to which the pharmacies agreed to charge Blue Shield specified maximum amounts for prescription pharmaceuticals were ordinary commercial supply arrangements and did not constitue the "business of insurance" within the meaning of the McCarran-Ferguson Act. As such, the contracts were held subject to routine evaluation under the antitrust laws. On March 5, 1979, this Court granted certiorari in the present case and, at the same time, remanded the action for "further consideration in light of [*Royal Drug*]." 440 U.S. 942 (1979). By order of November 9, 1979, the Court of Appeals remanded the matter to the District Court "for further proceedings in light of the Supreme Court action herein."

Following the remand to the District Court, the insurance company respondents filed renewed motions for summary judgment. Respondents based their motions on the grounds that: (1) the *Royal Drug* opinion confirmed the correctness of the ruling by the Court of Appeals in *Proctor I* that an alleged horizontal agreement among insurance companies to reimburse policyholders accord-

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[3] The first District Court and Court of Appeals decisions are referred to herein as "*Proctor I*."

ing to a common formula is the "business of insurance" under the McCarran-Ferguson Act; and (2) despite ample opportunities to do so, petitioners had failed to come forward with evidence of record to support their allegations of a conspiracy among respondents.

On October 23, 1980, the District Court issued a memorandum opinion and order granting respondents' renewed summary judgment motions and again dismissing petitioners' complaint. [1980-81] Trade Cas. (CCH) ¶ 63,591 (D.D.C. 1980). The District Court found that "[t]he decision in *Royal Drug* does not reach or disturb the 'core' ruling of the Court of Appeals that a horizontal agreement among insurers to pay insureds' claims on the basis of the prevailing labor rate in accordance with a common formula constituted the 'business of insurance' within the McCarran-Ferguson Act and, even if proved, was therefore exempt from the anti-trust laws." *Id.* at 77,139. The District Court also concluded that this Court remanded the case not because of any conclusion that the Court of Appeals had erred but rather because the District Court, in rejecting petitioners' allegations of improper "vertical arrangements" between the insurance company respondents and "captive" repair shops, had relied upon the lower court opinion subsequently reversed in *Royal Drug*. Accordingly, the District Court reconsidered these allegations of "vertical arrangements" and concluded that no antitrust violation had been demonstrated, even if such "vertical arrangements" were not the "business of insurance."[4]

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[4] The Petition for certiorari does not challenge the rulings of the District Court and the Court of Appeals that these alleged "vertical arrangements" did not violate the antitrust laws, and, in accordance with Rule 21.2 of the Rules of the Supreme Court, those allegations are not addressed in this Opposition.

In a comprehensive opinion issued on March 16, 1982,[5] the Court of Appeals affirmed the District Court's decision, ruling that "despite the current uncertainty about the nature and scope of the McCarran Act's 'business of insurance' exemption from the antitrust laws, the horizontal price-fixing agreement alleged by [petitioners] falls within that exemption." Op. at 63. In an alternate ground for decision, the Court of Appeals also ruled, "[a]fter carefully reviewing the evidence cited by [petitioners] in support of their price-fixing claim, . . . that they have failed to produce evidence to raise a genuine issue of material fact sufficient to defeat summary judgment on this claim." *Id.*[6]

It is these two rulings of the Court of Appeals that petitioners request this Court to review on a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THE RULINGS OF THE COURT OF APPEALS ARE ENTIRELY CONSISTENT WITH NUMEROUS OTHER DECISIONS ADDRESSING THE SAME ISSUES AND THERE ARE NO "SPECIAL AND IMPORTANT REASONS" FOR REVIEW BY THIS COURT

The considerations governing review on certiorari are set forth in Rule 17 of the Rules of the Supreme Court which provides, in pertinent part, that: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and

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[5] The Court of Appeals' second opinion is included in the Appendix to the Petition and is cited as "Op."

[6] Petitions for rehearing and for rehearing *en banc* were denied by *per curiam* orders of April 18, 1982. The second District Court and Court of Appeals decisions are referred to herein as "*Proctor II*."

important reasons therefor." 28 U.S.C. Revised Rules of the Supreme Court of the United States (Supp. IV 1980). No such "special and important reasons" for review are present in this case. The Court of Appeals' decision in *Proctor II* is entirely consistent with the rulings of all other courts which have considered the issues raised by petitioners and this Court has previously denied certiorari in a case presenting virtually identical issues.

Petitioners cannot point to a single respect in which the Court of Appeals' rulings depart from the numerous decisions of other courts which have considered these questions. Although numerous antitrust and related litigations were initiated against automobile insurance companies by repair shops during the last decade, *no* court has found the practices alleged by petitioners in the present case to violate the antitrust laws.

In addition to the decisions of the District Court and Court of Appeals in *Proctor II*, seven separate courts have rejected the types of contentions advanced by petitioners in the present case. *See Quality Auto Body, Inc.* v. *Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1717 (1982); *Workman* v. *State Farm Mutual Automobile Insurance Co.*, 520 F. Supp. 610 (N.D. Cal. 1981); *Nationwide Mutual Insurance Co.* v. *Automotive Service Councils*, [1981-1] Trade Cas. (CCH) ¶ 63,958 (D. Del. 1981); *DeBonaventura* v. *Nationwide Mutual Insurance Co.*, 419 A.2d 942 (Del. Ch. 1980), *aff'd*, 428 A.2d 1151 (Del. Supp. 1981); *Chick's Auto Body* v. *State Farm Mutual Automobile Insurance Co.*, 168 N.J. Super. 68, 401 A.2d 722 (Super. Ct. Law Div. 1979), *aff'd*, 176 N.J. Super. 320, 423 A.2d 311 (Super. Ct. App. Div. 1980).

This Court's recent denial of certiorari in the *Quality Auto Body* case—which presented issues virtually identi-

cal to those raised by petitioners—indicates that review on ceriorari would be inappropriate here. The body shop plaintiff in *Quality Auto Body*, as did petitioners, alleged that the insurance company respondents entered into a horizontal agreement to pay repair claims at the lowest competitive rates and to compute damage estimates on that basis. The Seventh Circuit first concluded that "the undisputed facts support a conclusion that the defendants *unilaterally* chose to estimate damage claims at the lowest prevailing competitive rate and instituted *separate* systems to calculate this rate." 660 F.2d at 1201 (emphasis added). The Seventh Circuit also held that even if the alleged horizontal agreement did exist, it would be immunized from scrutiny under the McCarran-Ferguson Act. Quoting from the District Court opinion in *Proctor II*, the Seventh Circuit stated that the alleged horizontal agreement was "directly related to the relationship between the insurer and insured and [involves] claims procedures, which are an important determinant of commonly made rates and the spreading of risks." 660 F.2d at 1201 n.4. On March 22, 1982, after the *Royal Drug* decision and after the Court of Appeals' decision in *Proctor II*, this Court declined to review these rulings. *See* 102 S. Ct. 1717 (1982).

The same result is appropriate in the present case.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THIS COURT'S DECISION IN *ROYAL DRUG* DID NOT DISTURB THE PRIOR RULING THAT AN ALLEGED HORIZONTAL AGREEMENT AMONG INSURANCE COMPANIES TO REIMBURSE POLICYHOLDERS ACCORDING TO A COMMON FORMULA IS THE "BUSINESS OF INSURANCE" UNDER THE McCARRAN-FERGUSON ACT

The core of petitioners' case was described by the Court of Appeals in *Proctor II* as follows:

> "Essentially, [petitioners] now claim that the insurance companies agreed to a common formula for *reimbursing their insureds* for the cost of automobile damage repair work. In particular, they allege a horizontal agreement among [respondents] to pay automobile damage claims on the basis of an agreed 'prevailing' hourly labor rate thereby artificially depressing the price of automobile repair work." Op. at 4 (emphasis added).

The insurance company respondents, fully supported by the record below, denied the existence of such an agreement. But in contending that such an agreement was outside the reach of the federal antitrust laws, respondents accepted, for purposes of argument only, the existence of the alleged horizontal agreement centering upon the relationship between respondents and their policyholders. Respondents contended, however, that any such agreement would be the "business of insurance" under the McCarran-Ferguson Act and, since such practices are regulated by the states, beyond challenge under the antitrust laws.[7]

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[7] As the Court of Appeals noted in *Proctor II*, petitioners "have never challenged the holding in the first District Court decision that the activities of the insurers in this case were sufficiently regulated by the laws of Virginia and Pennsylvania to satisfy the McCarran Act requirement of state regulation." Op. at 17.

The Court of Appeals in *Proctor I* concluded that a horizontal agreement among insurance companies *to pay or reimburse policyholders* according to a common formula would be the "business of insurance" and, under the McCarran-Ferguson Act, immune from the antitrust laws. The Court of Appeals expressed

> "little doubt that what [petitioners] have characterized as the 'core' of their case, the alleged horizontal agreement to pay insureds' claims on the basis of the prevailing labor rate, as well as [respondents'] supposed adherence to a common formula to compute damage estimates, fits within the 'core' of the 'business of insurance.' " 182 U.S. App. D.C. at 269, 561 F.2d at 267.

In *Proctor II*, the Court of Appeals determined upon remand that the decision in *Royal Drug* was consistent with its earlier ruling. After an exhaustive consideration of the applicability of *Royal Drug* to the facts of this case, and acknowledging that this Court's decisions did not directly resolve the issue, the Court of Appeals in *Proctor II* concluded that "the alleged horizontal agreement among the insurers should be regarded as the 'business of insurance.' " Op. at 25. As the Court of Appeals found, "the alleged agreement pertains to the adjusting and settling of claims, a practice traditionally regarded as part of the insurance business" and "at the heart of the relationship between insurer and insured." Op. at 33.

The Court of Appeals' conclusion on this point is fully in accord with this Court's decision in *Royal Drug*.

A. The Court of Appeals Correctly Concluded that the McCarran-Ferguson Act Was Directed at Intra-Industry Agreements Among Insurers as Distinguished from Vertical Agreements with Providers and Suppliers Outside the Insurance Industry

Contrary to petitioners' contentions,[8] the Court of Appeals properly concluded in *Proctor II* that a distinction must be drawn in applying the criteria established by *Royal Drug* between horizontal intra-industry agreements among insurers and vertical agreements for the purchase of goods and services from suppliers and providers outside the insurance industry. This Court's holding in *Royal Drug* concerned only vertical agreements by a single insurer and providers of goods and services other than insurance. This Court's opinion in *Royal Drug* took pains, however, to point out that different principles would apply in analyzing horizontal agreements relating to claims adjustment under the McCarran-Ferguson Act. The majority opinion in *Royal Drug* differentiated between "the obligations of Blue Shield under its insurance policies" and "the agreements between Blue Shield and the participating pharmacies." 440 U.S. at 213. A different standard was applied in the case of insurers' *vertical* agreements with providers on the basis of the principle that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties," in that case, third-party provider pharmacies. *Id.* at 231. In finding the pharmacy agreements at issue there outside the scope of the "business of insurance," this Court carefully distinguished *"wholly intra-industry"* agreements, for which the legislative history indicated an intended immunity. *Id.* at 224-25 n.32 (emphasis added).

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[8] *See* Petition at 9 & n.3.

The dissenting opinion in *Royal Drug*, which favored an even broader interpretation of the McCarran-Ferguson Act, accordingly described as the majority's view that "arrangements *among insurance companies* respecting premiums and benefits would constitute the business of insurance" regardless of whether they met the standard applied to vertical provider agreements. *Id.* at 244 (emphasis added). The dissent concluded that "the legislative history makes it abundantly clear that numerous *horizontal agreements* between insurance companies which do not technically involve the underwriting of risk *were regarded by Congress as within the scope of the Act's exemption for the 'business of insurance.'* " *Id.* (emphasis added).

Accordingly, the Court of Appeals was entirely correct in concluding that "at least some horizontal agreements among insurers fall within the 'business of insurance' exemption, and that the tests in *Royal Drug* for determining what constitutes the 'business of insurance' are more easily satisfied by an intra-industry agreement than by a vertical agreement with an entity outside the insurance industry." Op. at 28 (footnote omitted).[9] In-

[9] The Court of Appeals correctly rejected the contention, advanced here by petitioners, that, after *Royal Drug*, only the "subject matter of the agreement" determines whether or not the "business of insurance" exemption is applicable. Petition at 8. This "subject matter" test would swallow the McCarran-Ferguson exemption as it applies to automobile insurance, a result clearly contrary to this Court's carefully circumscribed analysis in *Royal Drug*. The very risk covered by respondents' insurance policies is the potential cost to insureds of automobile repair resulting from accidents. If the "subject matter" of automobile repair were the only test, virtually all joint activities by automobile insurers would be outside the "business of insurance." The Court of Appeals properly declined "to impose so sweeping an interpretation on *Royal Drug*." Op. at 28 n.29.

deed, in its recent decision in *Union Labor Life Insurance Co.* v. *Pireno*, 50 U.S.L.W. 4911 (U.S. June 28, 1982), this Court underscored the distinction suggested in *Royal Drug* between horizontal agreements and vertical provider agreements under the McCarran-Ferguson Act. In determining whether the use of peer review committees was outside the scope of the McCarran-Ferguson Act, this Court noted that an important criterion for identifying a particular practice as part of the "business of insurance" is whether "the practice is limited to entities within the insurance industry." *Id.* at 4913. This Court reiterated in *Pireno* that the McCarran-Ferguson Act "was intended primarily to protect '*intra*-industry cooperation' in the underwriting of risks." *Id.* at 4914 (emphasis in original). Because the peer review committee—like the provider pharmacies in *Royal Drug*—involved "parties wholly outside the insurance industry," this Court found that the criterion had not been met in the *Pireno* case. *Id.* Nonetheless, this Court noted that "the claims adjustment process itself" occurs "*wholly within the insurance industry*" so as to satisfy this criterion. *Id.* at 4914 n.8 (emphasis added).

Thus, in finding the horizontal agreement alleged here to be the "business of insurance," the Court of Appeals correctly relied upon the fact that the alleged agreement was a horizontal intra-industry activity among insurance companies.

B. The Court of Appeals Correctly Concluded that Viewing the Alleged Horizontal Agreement as Part of the "Business of Insurance" Is Consistent with Congress' Desire To Exempt from the Antitrust Laws Sharing of Information and Agreements Among Insurers Concerning Ratemaking

This Court found in *Royal Drug* that the legislative history of the McCarran-Ferguson Act reflected a Con-

gressional desire to exempt cooperative ratemaking and sharing of statistical data among insurance companies from the scope of the antitrust laws. This Court stated: "Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." 440 U.S. at 221. Based upon these observations, the Court of Appeals concluded that "it seems clear that Congress intended the [McCarran-Ferguson] exemption to cover the sharing of data on the rate of past losses and other information on the probability that particular losses will occur." Op. at 30.

As the Court of Appeals noted, however, risk *probability* is only one element of the ratemaking formula. Insurers must also calculate the magnitude of the payments the insurer must make to insureds if the loss insured against occurs. In the automobile liability insurance industry, the premiums charged by insurers must directly reflect the cost to insureds of repairing (or replacing) the damaged vehicle. Thus, as the Court of Appeals concluded, sharing of information relating to such cost is part of the cooperative ratemaking efforts which Congress intended to immunize.

The Court of Appeals stated:

> "We . . . do not believe that Congress, in protecting 'cooperative ratemaking' intended to allow concerted action in determining the rate of past losses of insurers and the probability of future losses, but not to allow similar combined efforts in determining how to calculate the expected magnitude of loss, *i.e.*, the *current* cost of repair. In this case, insurers have allegedly collected and shared data on the cost of

> repair, labor costs in particular, and agreed on a prevailing hourly rate to be used in estimating damage claims. *Such activity is closely akin to cooperative ratemaking since it involves a necessary part of the ratemaking process.*" Op. at 31 (emphasis added).

Accordingly, the Court of Appeals correctly determined that the agreement alleged here was a part of the activities which Congress intended to immunize under the McCarran-Ferguson Act.

C. The Court of Appeals Correctly Determined that the Horizontal Agreement Alleged Here Pertains to the Adjusting and Settling of Insurance Claims and Is Therefore Part of the "Business Of Insurance"

The crux of this Court's holding in *Royal Drug* was that the provider agreements at issue there had nothing to do with the benefits to be paid insureds pursuant to their policies. 440 U.S. at 213-14. The agreement alleged in this case, however, by which insurance companies adjust policyholder claims and determine the amount to pay or reimburse their policyholders is, as the Court of Appeals found in *Proctor II*, "a practice traditionally regarded as part of the insurance business" and "at the heart of the relationship between insurer and insured." Op. at 33.

Petitioners challenge this ruling of the Court of Appeals on the basis that the horizontal agreement alleged here involves, as did the provider agreements in *Royal Drug*, "the mass purchase of goods and services from entities outside the insurance industry." Petition at 4, 9. This contention is based, as the District Court noted in *Proctor I*, upon nothing more than a "clever, but misleading turn of phrase." 406 F. Supp. at 30. Insurance companies do *not* pay repair shops for automobile damage repairs, as petitioners contend. As even the Petition

acknowledges, the reason insurance companies estimate automobile damage is because "[u]nder the terms of their *policies*, [insurance companies] agree to pay and/or reimburse *insureds* for the repair of automobile damage according to the terms of the individual policies involved." Petition at 4 (emphasis added).

What is involved in this case is a challenge by petitioners to a method allegedly used by the respondent insurance companies to determine how much to pay in *adjusting and settling claims* submitted by or on behalf of insureds. Doubtless, respondents' claims practices have some effect on the business of automobile body shop repairs. But, as the Court of Appeals recognized, that is of no legal significance. What is significant under the McCarran-Ferguson Act is that respondents' practices are part of the "business of insurance," for that is what exempts them from the federal antitrust laws.

The Court of Appeals' ruling in this regard is supported by all relevant legal authority. As the Court of Appeals noted, other courts that have addressed this question have held that the type of horizontal agreement alleged here constitutes the "business of insurance." *See, e.g.*, *Quality Auto Body* v. *Allstate Insurance Co.*, *supra*, 660 F.2d at 1201 & n.4; *Workman* v. *State Farm Mutual Automobile Insurance Co.*, *supra*, 520 F. Supp. at 615-16 n.7; *cf. Chick's Auto Body* v. *State Farm Mutual Automobile Insurance Co.*, *supra*, 401 A.2d 722 (construing, prior to *Royal Drug*, state law antitrust exemption analogous to McCarran-Ferguson Act).

Moreover, the Solicitor General's amicus brief for the United States in *Royal Drug* specifically approved of the

Court of Appeals' ruling reaffirmed in *Proctor II* as to the alleged horizontal agreement:[10]

> "We agree with the court's conclusion [in *Proctor I*] about the horizontal agreements among the insurance companies. *They are wholly intra-insurance industry agreements concerning the extent to which particular claims would be paid.* The formula for the payment of insurance claims is an integral part of any contract of insurance, because it determines how much risk is involved, and how much of the risk will be assumed by the insurer. Such agreements among insurers are no different in substance from agreements on the premiums to be charged, and the McCarran-Ferguson Act's chief purpose was to leave such matters exclusively to state regulation." Amicus Brief at 31 (emphasis added) (footnote omitted).

According to the Solicitor General:

> "The appropriate principles, in our view, may be summarized as follows: If two or more insurance companies agree on the premiums to be charged for insurance *or on the benefits to be paid for a given insured loss*, such agreements are part of the 'business of insurance' and are ordinarily immune from antitrust scrutiny (if they are regulated by state law)." Amicus Brief at 32 (emphasis added).[11]

This Court's recent decision in *Pireno* confirms the correctness of the Court of Appeals' ruling that a horizon-

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[10] A copy of this amicus brief is included in Respondents' Court of Appeals Supplemental Appendix ("Supp. App.") at 6.

[11] As the Court of Appeals noted (Op. at 27 n.28), the Antitrust Division also recently submitted a memorandum for the United States as amicus curiae in an ongoing suit that is factually similar to this case. (A copy of this memorandum was lodged in the record before the Court of Appeals.) This memorandum concludes that an agreement among insurers "to provide reimbursement only for the competitive or prevailing cost of repair would . . . be immune from

tal agreement relating to the claims adjustment process is part of the "business of insurance." In *Proctor II*, the Court of Appeals disagreed with the *dictum* of the Second Circuit in its *Pireno* opinion that claims settlement was not part of the "business of insurance." Op. at 33-34. This Court did not accept the Second Circuit's view and, indeed, stated in *Pireno* that the "*claims adjustment process itself*" occurs "wholly within the insurance industry" and satisfies the criterion that a challenged practice not involve parties outside the insurance industry. 50 U.S.L.W. at 4914 n.8.

Thus, the Court of Appeals correctly anticipated the *Pireno* decision in concluding that an intra-industry agreement relating to claims adjustment is part of the "business of insurance."

III. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN CAREFULLY REVIEWING AND LIBERALLY CONSTRUING IN A LIGHT FAVORABLE TO PETITIONERS THE EVIDENCE OF RECORD MARSHALLED IN OPPOSITION TO RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT, AND IN CONCLUDING THAT NONE OF THIS EVIDENCE SUPPORTED ANY INFERENCE OF A HORIZONTAL CONSPIRACY AMONG RESPONDENTS

Assuming, contrary to its holding, that the "business of insurance" exemption did not apply to the horizontal

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the antitrust laws if regulated by state law." Memorandum of the United States as Amicus Curiae at 5-7, *D&B Auto Body, Inc.* v. *Allstate Ins. Co.*, No. 79-0550 (D.R.I.). Any ambiguity in the memorandum concerning this point is resolved by the Antitrust Division's approving citation of the District Court's decision in *Proctor II* that the horizontal agreement alleged here was part of the "business of insurance." *Id.*

agreement alleged here, the Court of Appeals reached a second issue fully briefed by the parties but not decided by the District Court, *i.e.*, had respondents demonstrated the absence of any genuine issue of fact material to petitioners' price-fixing claim and that respondents were entitled to judgment as a matter of law. Op. at 35. After carefully reviewing and liberally construing—in a light most favorable to petitioners—all of the record evidence marshalled in opposition to summary judgment, the Court of Appeals found that none of the evidence supported petitioners' allegations or created any inference of conspiracy. The Court of Appeals concluded "that no rational jury could find from [petitioners'] evidence that [respondents] had conspired to fix the price of automobile body repair work and [held] that it is inadequate to defeat a motion for summary judgment against [petitioners]." Op. at 39.

Petitioners challenge this ruling by the Court of Appeals on the ground that they had not been afforded an adequate opportunity to develop a factual record in opposition to respondents' motions. Petition at 12-13. More particularly, petitioners assert that: "Discovery has not even been completed." Petition at 13. This is simply not true. By letter of January 17, 1975 (Exhibit A), counsel for petitioners advised the District Court as follows *prior* to filing of the first round of summary judgment motions:

> "Dear Judge Pratt:
>
> "This is to advise that *Plaintiffs have substantially concluded discovery* in the above-entitled matter. All that remains is the conclusion of the deposition of Paul Condrin in Altoona, Pennsylvania, and certain ministerial matters in regard to documents which have already been made available, but which at the

time we had not copied either the document itself or certain parts thereof.

* * *

"Therefore, it would seem appropriate that the parties proceed with the filing of such dispositive motions as they deem desirable" (emphasis added).

Shortly thereafter, respondents accepted petitioners' invitation and filed summary judgment motions against petitioners' claims. At no time since have petitioners sought any supplemental discovery, and at least four times they have fully briefed the issue of alleged concert of action by respondents.

Petitioners similarly assert that the factual record reviewed by the Court of Appeals was "deficient" because petitioners did not have an opportunity to renew discovery in light of documents produced by defendant Liberty Mutual during spring 1980. Petition at 13. Again, the record contradicts this contention. The documents at issue were turned over to petitioners on April 21, 1980. Petitioners did not reply to respondents' renewed summary judgment motions until May 23, 1980, and their opposition referred throughout to the materials produced by Liberty Mutual. It was not until October 23, 1980—six months after Liberty Mutual turned over these documents—that the District Court issued its second decision granting summary judgment for respondents. At no point during this six-month period did petitioners make any request for further discovery with respect to the Liberty Mutual documents. Petitioners had a full opportunity to do so and may not now assert that *their* tactical decision to refrain from requesting further discovery provides a basis for challenging the Court of Appeals' ruling.

In all events, these Liberty Mutual documents afforded no support for petitioners' allegations. *See* Op. at 41-43, 46-47. Petitioners characterized these Liberty Mutual documents as reflecting discussions among respondents concerning body shop hourly rates, "*without allusion.*" Petitioners' Court of Appeals Brief at 23 (emphasis added). If petitioners meant that the documents *did not allude* to the subject of body shop hourly rates, that is correct; none of the documents indicated any communication among respondents about hourly rates whatever. Similarly, petitioners asserted that the Liberty Mutual documents "disclose a series of communications, the purpose of which was to ascertain how each insurance company was enforcing 'prevailing' labor rates on repair shops . . . ." *Id.* Not a single one of the documents cited even refers to "prevailing" labor rates.[12] The Court of Appeals reviewed each of the Liberty Mutual documents relied upon by petitioners and found that they "do not contain any information about the prices charged by automobile repair shops or any *suggestion* of concerted action by [respondents] to impose a specified labor rate on repair shops." Op. at 43 (emphasis added).

Petitioners' contention that the Court of Appeals exceeded its jurisdiction by deciding an issue not considered by the District Court (Petition at 12-13) is equally without merit. In the case relied upon by petitioners — *Singleton* v. *Wulff*, 428 U.S. 106 (1976) — this Court held that a court of appeals should not have resolved the merits of the case because petitioner had not even filed an answer or pleading addressed to the merits. This Court made clear in *Singleton*, however, that "[t]he matter of what ques-

[12] The documents were included in petitioners' Court of Appeals Appendix at 281A-282A, 287A-292A and 301A-304A.

tions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121. Under this standard, an appellate court may affirm a grant of summary judgment on a ground not relied upon by the lower court, provided "the opposing party [has had] a fair 'opportunity to dispute the facts material' to the new theory." *United States* v. *General Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975) (quoting *Fountain* v. *Filson*, 336 U.S. 681, 683 (1949)); *accord*, *Rich* v. *United States Lines, Inc.*, 596 F.2d 541, 551 (3d Cir. 1979); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674, 682-83 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976).

As the Court of Appeals noted, this case has been litigated for over ten years. The District Court afforded petitioners three years in which to conduct discovery. That discovery was extensive; respondents produced thousands of documents and petitioners and respondents conducted over fifty depositions. As noted above, respondents did not file their summary judgment motions until petitioners indicated that their pretrial discovery was complete.

Petitioners not only had a fair opportunity to develop evidence to support their price-fixing claim, but they made the purported factual basis for their case a major part of their presentations to the District Court *and* to the Court of Appeals, both before and after the *Royal Drug* decision. The renewed summary judgment motions filed by three of the respondents relied on contentions that petitioners had produced no evidence to support

their claim.[13] The major portion of petitioners' opposition was devoted to demonstrating that there was sufficient record evidence to withstand summary judgment on their horizontal claim. *See* Petitioners' Memorandum at 9-35. In addition, much of petitioners' brief to the Court of Appeals was an effort to show that they had submitted adequate evidence of a horizontal price-fixing conspiracy.

Thus, the Court of Appeals correctly concluded that petitioners "had a fair opportunity to contest, and have in fact contested, the assertion that they have presented inadequate evidence of a horizontal price-fixing conspiracy to defeat a motion for summary judgment on that issue." Op. at 37.

Equally unmeritorious is petitioners' contention that the Court of Appeals violated the standards established by this Court for grants of summary judgment in antitrust actions. As this Court stated in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968):

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust com-

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[13] *See* Supplemental Memorandum of The Travelers Indemnity Company in Support of Its Renewed Motion for Summary Judgment, Supp. App. at 123, 127-29; Memorandum of Points and Authorities in Support of Defendant Nationwide Mutual Insurance Company's Renewed Motion for Summary Judgment, *id.* at 219, 238-43; Supplementary Statement of Allstate Insurance Company Renewing Its Pending Motion for Summary Judgment, *id.* at 259, 260-61. Travelers' Memorandum was devoted entirely to the point that petitioners had failed to adduce any evidence to support their allegations against Travelers.

> plaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

There can be no doubt that the Court of Appeals correctly determined that petitioners failed to produce "significant probative evidence tending to support the complaint." In an exhaustive fifteen-page analysis of the evidence upon which petitioners relied, the Court of Appeals considered all of petitioners' allegations in their Court of Appeals' submissions, all of the evidence cited by petitioners to the District Court in opposing summary judgment, and each of the affidavits submitted by petitioners to the District Court. Op. at 39-53. The Court of Appeals' opinion conclusively demonstrates that petitioners' allegations of conspiracy were based on no evidence whatever.

For the most part, petitioners attempted to avoid summary judgment by misdescribing the evidence of record. Petitioners have relied on this tactic throughout the litigation. They have remained silent when respondents pointed out the inaccuracy of petitioners' citations to the record. Petitioners make no effort now to respond in the teeth of the Court of Appeals' devastating and careful analysis of the evidence of record.

Respondents will describe a typical example of the "evidence" relied upon by petitioners. As the Court of Appeals indicated, petitioners cited one Nationwide document (Petitioners' Court of Appeals Appendix at 168A), which might be called the "Charlie" document, to support a number of their key allegations. *See* Op. at 40 n.41. The document was cited as evidence that respondents agreed "among themselves to pay to [petitioners] and others similarly situated an amount for the repair of an automobile computed at the fixed hourly rate." Peti-

tioners' Court of Appeals Brief at 6. This document was the only support cited for the assertion that: "The independent shop was placed in the position of 'take-it-or-leave-it' — accept our figure or lose the business." *Id.* at 7. The "Charlie" document showed, according to petitioners, that "[r]eadjustments to the 'prevailing' rate were made with great reluctance and only under the most adverse circumstances." *Id.* at 30. The document also purportedly demonstrated that the "prevailing" rate "was an item of vital concern to the [respondents] and one which they monitored closely." *Id.* at 31.

In fact, the "Charlie" document provided no support for any of these assertions. The "Charlie" document is an internal handwritten note from Robert G. Berker of Nationwide which states in its entirety:

> "Charlie, here is the first one of these received for some time. I expect more. I believe James Lacey is currently pres of [illegible] Auto Body Assn. (I'm not sure)."

There is a note in the corner requesting "Mabel" to keep a file and "follow up in Nov. with me." That is all the document says, and there is no other evidence of any kind connecting the "Charlie" document to anything else in the record that might give it added meaning. Summary judgment procedures are designed specifically to cut through such empty allegations to reveal the absence of any evidentiary support sufficient to justify a trial by jury.

CONCLUSION

For the foregoing reasons, respondents respectfully request the Court to deny the petition for a writ of certiorari in the present case. The Court of Appeals' decision is entirely consistent with those of other courts which

have considered these issues. This Court previously denied certiorari in a virtually identical case. *Quality Auto Body, Inc.* v. *Allstate Insurance Co.*, 102 S. Ct. 1717 (1982). The Court of Appeals correctly applied the *Royal Drug* decision and correctly anticipated this Court's ruling in *Pireno*. Moreover, the Court of Appeals found, as an alternate basis for decision, that petitioners had failed to come forward with any evidence to support their allegations.

There are no "special and important reasons" for review of these rulings.

Respectfully submitted,

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July 28, 1982

APPENDIX

EXHIBIT A

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January 17, 1975

Honorable John H. Pratt
United States District Judge
United States District Court
for the District of Columbia
Room 4323
United States District Court House
John Marshall Place and Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Phillip M. Proctor, et al. v. State
Farm Mutual Automobile Insurance, et al.
Civil Action Number 249-72

Dear Judge Pratt:

This is to advise that Plaintiffs have substantially concluded discovery in the above-entitled matter. All that remains is the conclusion of the deposition of Paul Condrin in Altoona, Pennsylvania, and certain ministerial matters in regard to documents which have already been made available, but which at the time we had not copied either the document itself or certain parts thereof.

In regard to the Counterclaim of Travelers, we are presently beginning the task of examining all of the claim files that have been made available.

Therefore, it would seem appropriate that the parties proceed with the filing of such dispositive motions as they deem desirable.

Sincerely,

Jerry S. Cohen

JSC:dlk
cc: All Counsel